SANJIV

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1966 OF 2006

Mrs. Rima Singh @ Rima Sahi ....Petitioner

Vs.

The State of Maharashtra & Ors. ....Respondents

Ms. Anjana Prabhakar i/by A. V. Chatuphale, for petitioner.

Mr. N. G. Chhatre for respondent 2.

Ms. M. H. Mhatre, APP for the State.

CORAM : SMT. RANJANA DESAI, J.

DATE : 23TH NOVEMBER, 2006.

P. C.:-

1. The petitioner who is the original complainant and P. W. 9 has challenged in this writ petition, order dated 07/04/2006 passed by the Judicial Magistrate, First Class, Vashi in Criminal Case No. 765 of 2002 arising out of C.R. No. 326 of 2000 and the order dated 18/07/2006 passed

by the learned Sessions Judge, Thane in Criminal Revision No. 131 of 2006.

2. I have heard the learned counsel for the petitioner as well as the learned counsel for respondent 2 who is original accused 2. It appears that the application under Section 311 of the Code of Criminal Procedure ("the Code" for short) was filed by the State before the learned Judicial Magistrate, First Class, Vashi on 22/02/2006 for recalling P.W. 9, who is the complainant, for further examination-in-chief. I may note that at this stage that the learned counsel for respondent 2 has argued that in fact this is not an application filed at the instance of the State. In this connection it is pertinent to note that on 16/10/2006 in his order of the same date Justice Oka has noted the statement of the petitioner's advocate that the petitioner has signed the said application. Justice Oka has also recorded the statement of the petitioner's advocate that the application was drafted by the concerned prosecutor at the instance of the said prosecutor and an affidavit to that effect will be filed in this Court. Justice Oka further noted that the said application appears to have been signed by the petitioner on behalf of the State. As per the statement made in the Court affidavit has been filed by the petitioner on 16/11/2006 stating that the said application was duly

signed by the learned APP and the APP had instructed her to sign the said application as she was present in the court. This statement appears to be true because the copy of the application bears the signature of the petitioner as well as the signature of the prosecutor.

3. By order dated 29/03/2006 the learned Judge allowed the re-examination of P. W. 9-the complainant for production of documents. In his order the learned Judge observed that after going through the relevant portion of the evidence it is clear that it was the defence who called upon the complainant to produce the documents. He further observed that disallowing the production of documents would not be proper. He clarified that the complainant was not directed by the court to produce any documents. Thereafter, the re-examination of the complainant began, on 07/04/2006. The learned APP stated that he wants to lead entire evidence and to produce documents which are mentioned in the application of the complainant dated 28/12/2005. The learned Magistrate observed that he was not inclined to allow the complainant to produce all documents because the court had allowed recalling of the complainant for the limited purpose namely the production of documents which she was called upon to produce by the advocate of accused 2. He further observed that the

application has been allowed only for the production of the documents referred to in the cross-examination as the same was called upon by the defence and the complainant later on expressed her willingness to produce them on record.

4. The learned counsel for the petitioner contended that in the interest of justice and for the just-decision of the case, the learned Magistrate should have allowed the petitioner to produce all the documents particularly those which have been mentioned in the application dated 28/12/2005. Learned counsel contended that the order dated 29/03/2006 does not indicate that the production was limited only to documents showing the compliance of the conditions of CIDCO. She therefore, contended that in the interest of justice this Court should allow the production of documents.

5. The learned counsel for respondent 2 however, strenuously opposed the above submission. He submitted that by allowing this application the scope of limited enquiry would be unnecessarily enlarged and in fact the complainant was called upon to produce documents in respect of compliance of conditions of CIDCO and hence her application may not be allowed.

6. Being aggrieved by the impugned order dated 07/04/2006, passed by

the learned Magistrate, a revision was carried to the Sessions Court. The Sessions Judge was of the opinion that his jurisdiction was limited and the impugned order being an interlocutory order it could not be interfered with. He however observed that no witness can be recalled after recording statement of the accused under Section 313 of the Code. Yet he confirmed the learned Magistrate's view and held that the learned Magistrate has rightly disallowed the prayer of the prosecution to produce other documents. The learned Sessions Judge relied on the judgment of the Supreme Court in ***Mir Mohd. Omar and others Vs. State of West Bengal, AIR 1989 SC 1785.*** The petitioner has challenged these orders in this writ petition.

7. So far as the reliance placed by the learned Sessions Judge on ***Mir Mohd.'s*** case is concerned in my opinion, it is misplaced. In that case the High Court had given liberty to the prosecution to file application for re-examination of P. W. 34. The Supreme Court has observed that the High Court proceeded on the assumption that P. W. 34 would be recalled for further examination. It is in this context that the Supreme Court observed that the prosecution had closed the evidence; the accused had been examined under Section 313 of the Code and therefore, the liberty reserved to the prosecution to recall P. W. 34 for re-examination is uncalled for. In

the present case, the application of the State has been allowed for the production of the documents referred to in the cross-examination as the same was called upon by the defence. The learned Magistrate has stated that the complainant later on expressed her willingness to produce the same on record. In my opinion, therefore, to these facts the judgment of the Supreme Court in Mir Mohd.'s case would not be applicable. The learned Sessions Judge should have appreciated that having allowed the State's application partly, it was not open for him to observe that since examination of the accused under Section 313 of the Code was conducted, it was not open to allow production of other documents.

8. In this connection I may refer to the judgment of the Supreme Court in ***Mohanlal Shamji Soni Vs. Union of India and anr. 1991 Cri. L. J. 1521.*** In that case the Supreme Court was dealing with Section 540 of Criminal Procedure Code (5 of 1898). The said section is equivalent to Section 311 of the Code. The Supreme Court held that power to summon witnesses available in Section 540 can be exercised at any stage of proceeding if examination of such person is essential for just decision of the case. The Supreme Court clarified that opportunity to rebut should be given to other party whenever new evidence is admitted under Section 540.

Following are the relevant observations of the Supreme Court.

> *"It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions S. 540 of the Code (S. 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or reexamine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated. The very usage of the words such as 'any Court', 'at any stage' or 'of any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code.The second part of the section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case."*

Keeping these principles in mind, this case will have to be approached.

9. The learned Magistrate has observed that order passed on Exhibit 77 speaks about the complainant's right of producing documents showing the compliance of the conditions of the CIDCO as she was called upon to produce the same by the other side. However, order dated 29/03/2006 passed on the said application, Exhibit 77 does not clearly state so. In this order it is nowhere stated that the complainant has to produce only the documents in respect of the compliance of the conditions of CIDCO.

10. The petitioners case appears to be that 2nd respondent who is her husband has conspired with the 3rd respondent and fabricated documents and transferred plot No. 346 which was in her name in his name and thus she has been cheated for a sum of Rs. 6 lakhs. In the application dated 28/12/2005 the complainant had referred to several documents. But it is not possible to allow her to produce all documents. Power under Section 311 is to be exercised to arrive at just-decision but that power also must be exercised with care and circumspection. In the facts of this case, I am of the opinion that having regard to the nature of the petitioner's case apart from the documents, which are concerned with the compliance of conditions of CIDCO certain other documents which are referred to in application of the

complainant dated 28/12/2005 must be allowed to be produced in accordance with law to arrive at just-decision of the case. However, it is not necessary to burden the court with all the documents. In my opinion, the learned Magistrate should allow the complainant to produce the documents mentioned at sub-clause 3 (a), (b), (c), (d), (e), (f), (g) & (l) and (m) in the said list. The production of the other documents must not be allowed. Production will have to be allowed only in accordance with law. Needless to say that, on such production being allowed the accused will have to be given an opportunity to rebut the said evidence. Hence I pass the following order.

11. The impugned order dated 18/07/2006 passed by the Sessions Court, Thane is set aside. The impugned order dated 07/04/2006 passed by the Judicial Magistrate, First Class, Vashi is set aside to the extent it disallows the application of the petitioner to produce documents mentioned hereinafter. The petitioner is allowed to produce the documents which are mentioned in application dated 28/12/2005 at serial No. 3 (a) to 3 (g), 3 (l) and 3 (m) in accordance with law. Production of rest of the documents is not allowed. Needless to say that the respondent-accused will be given an opportunity to rebut this evidence. It is made clear that this court has not

expressed any opinion on the merits of this case. The Writ Petition is disposed of in the above terms.

(SMT. RANJANA DESAI, J)